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Supreme Court, U.S.
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No. 01-936

IN THE

Supreme Court of the United States

MARY PAMELA BESSER and RICHARD GREEN,

Petitioners,

v.

KENNETH E. HARDY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

From 1995 through 1998, Kenneth Hardy taught in the communications department at Jefferson Community College ("JCC"), a public college in Louisville, Kentucky. Hardy was an adjunct instructor, and his contract thus ran semester to semester. Petition, Appendix A at 2a. Student evaluations revealed that he was an excellent professor, and he was highly regarded within the institution. *Id.* at 3a. In the spring of 1998, JCC assured Hardy that, in addition to his Summer Term courses, he would again teach three courses in the upcoming fall. *Id.* During the Summer Term, however, came the controversy that underlies this litigation.

Hardy taught a summer class entitled "Introduction to Interpersonal Communication," and devoted one class period to social deconstructivism, specifically to an examination of terms commonly used to oppress or marginalize individuals and social groups. *Id.* Hardy asked class members to recommend terms for discussion, and many responded. Some of the words proposed and discussed included "girl," "lady," "faggot," "nigger," and "bitch." Pet. App. A at 3a. A stimulating and academically productive discussion of these words ensued.

While a large majority of Hardy's twenty-two students found the discussion to be a valuable educational and philosophical experience, one student categorically opposed any in-class use of the terms "nigger" or "bitch," and voiced her objection to Hardy. Sensitive to this student's concerns, Hardy gave her the option to avoid further discomfort by foregoing the remainder of the discussion without academic penalty.

She dismissed this proposal as unsatisfactory, and instead took her complaint both to Richard Green, the college's President, and to Reverend Louis Coleman, a prominent civil rights activist in the Louisville community. *Id.* at 3a-4a. Reverend Coleman met with Green, and requested that JCC take action to address and correct Hardy's alleged transgression. Separately, Hardy met with Mary Pamela Besser, Acting Dean of his department, who advised him that a prominent citizen had become involved in the controversy. *Id.* at 4a. On August 23, 1998, JCC advised Hardy – ambiguously, in retrospect – that the parties had reached a satisfactory resolution of their dispute. *Id.* Hardy apparently was not among the parties contemplated by this statement, as JCC did not invite him to teach again in the Fall Term, nor has it invited him back since. JCC claims there were simply no classes for Hardy to teach, and has never suggested that Hardy violated any of its academic policies or mandates.

In July, 1999, Hardy filed a complaint, alleging both state and federal causes of action, and naming as defendants JCC, the Kentucky Community and Technical College System, and Besser and Green individually. The current dispute centers on allegations that Besser and Green, by retaliating against Hardy for exercising his rights of free speech and academic freedom, deprived him of his First and Fourteenth Amendment rights, in violation of 42 U.S.C. § 1983.

Besser and Green have moved to dismiss, contending that Hardy's academic treatment of offensive words merits no protection under the First Amendment. Alternatively, they assert qualified immunity, on the grounds that any rights Hardy may have are not so clearly established that reasonable people in their positions would have known of them. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The District Court rejected both of these claims. Pet. App. B at 21a. Citing this Court's ruling in *Connick v. Myers*, 461 U.S. 138, 140 (1983), the Court noted that individuals do not, by accepting government employment, surrender their right to speak freely on matters of public concern. *Id.* at 26a. The District Court found that Hardy had cleared the preliminary hurdle of showing that the classroom discussion implicated matters of public concern, based on the as-yet-uncontradicted allegations of his Complaint. *Id.* The Court distinguished *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1993), in which a college basketball coach used the term "nigger" as part of an exhortation to his players during a halftime speech – a context plainly devoid of academic significance. *Id.* at 27a.

While the District Court did not cite this Court's ruling in *Pickering v. Board of Education*, 391 U.S. 563 (1968), it implicitly acknowledged the standard set forth there, noting that Hardy's free speech interests would ultimately need "to be weighed against the school's interests in promoting the efficiency of its services." Pet. App. B at 27a. Because the matter appeared on a motion to dismiss, however, there was no evidence to demonstrate that Hardy's speech had any adverse effect on the school's ability to meet its legitimate goals. The District Court acknowledged that JCC might ultimately prevail on a balancing test, but concluded that any such victory would be won in the procedural future.[1]

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1. Ultimately, Petitioners may also prevail on other grounds as well, such as by showing that Hardy's contract would not have been renewed irrespective of his protected speech. *See e.g., Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416-17 (1979); *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). The current procedural posture, however, makes any such argument premature.

Finally, the court rejected JCC's contention that Hardy's First Amendment rights were not so clearly established that reasonable officials would have known their violation to be proscribed. *See Harlow*, 457 U.S. at 818 (1982). The court acknowledged that no precedent existed applying facts identical to those at bar, but rejected this as the test. Pet. App. B at 27a. Instead, the court framed the operative question as whether a public employee has a clearly established constitutional right to speak on matters of public concern. *Id.* Answering in the affirmative, and finding that reasonable officials would know of this right, the District Court denied qualified immunity.

Besser and Green appealed the denial of qualified immunity to the Sixth Circuit. The Sixth Circuit, citing *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985), took pains to note that its jurisdiction over the otherwise interlocutory order "is confined to the 'purely legal' question of 'whether the facts alleged . . . support a claim of violation of clearly established law." Pet. App. A at 7a. Its inquiry limited to the facts Hardy pled, the Sixth Circuit properly disregarded Petitioners' attempt to dismiss this case as "nothing more than an internal employment dispute." Pet. App. A at 8a.[2]

Citing *Connick*, the court noted that the threshold inquiry is whether a given statement touches on matters of public concern. *Id.* at 10a. This preliminary question must be answered by reference to the "content, form, and context

2. Although Petitioners now acknowledge that the denial of qualified immunity is reviewed only on pure legal grounds, they nevertheless repeatedly represent that Hardy's speech was contrary to JCC's pedagogical mission and contrary to Hardy's own classroom policies, and that JCC furthered legitimate purposes by terminating him. These purported facts lie clearly outside the record.

of a given statement, as revealed by the whole record." *Id.*, *citing Connick*, 461 U.S. at 147-48. Applying this test to the facts pled, the court held that Hardy's discussion implicated matters of public concern, because it was "germane to the subject matter of his lecture on the power and effect of language," and was "limited to an academic discussion of the words in question." Pet. App. A at 11a. The court distinguished *Dambrot, supra*, where the ostensible point of the coach's speech had been to motivate basketball players.

While finding that Hardy's classroom discussion of offensive words fell short of "pure public debate," the Sixth Circuit held, "it does relate to matters of overwhelming public concern – race, gender, and power conflicts in our society." *Id.* at 12a. This hurdle overcome, the Sixth Circuit then applied the familiar *Pickering* balancing test. In response to JCC's argument that Hardy's discussion would disturb its function, the Sixth Circuit cited this Court's observation in *Tinker v. Des Moines Indep. School District*, 393 U.S. 503, 508-09 (1969), that:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.

Observing that JCC's concerns about the negative impact of the controversy were precisely the type of "undifferentiated fear" frowned upon by *Tinker*, and specifically noting that the school did not object until Reverend Coleman had intervened, the Sixth Circuit concluded that the balance tipped strongly in Hardy's favor. Pet. App. A at 16a. It therefore affirmed the District Court's denial of qualified immunity.

In their Petition for a Writ of Certiorari, Besser and Green make an even more expansive argument than the one they presented to the Sixth Circuit. They now suggest that Hardy's discussion, simply because it took place in the classroom, enjoys no First Amendment protection. In support of their claims, Petitioners cite cases from the Third, Fourth, and Fifth Circuit, cases it contends are irreconcilable with the Sixth Circuit holding in this case. As discussed below, none of the cases on which Petitioners rely supports the sweeping proposition that professors have no First Amendment rights in the classroom. Instead, every circuit adopts this Court's mandate in *Connick*, and examines the substance of the speech in question.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURTS UNIFORMLY RECOGNIZE THAT PUBLIC EMPLOYEES MAY ENJOY FIRST AMENDMENT PROTECTIONS IN THE WORKPLACE

The Sixth Circuit balked at Petitioners' suggestion that educators in public employ check their First Amendment rights at the schoolhouse door:

> [T]he argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive. [Pet. App. A at 13a].

Petitioners nevertheless reiterate the argument here, and assert that cases from the Third, Fourth, and Fifth Circuits "as a threshold matter preclude First Amendment protection

for teacher speech that is spoken as part of the teacher's job." Petition, at 14. The cases on which Petitioners rely probe the admittedly unsettled boundaries of academic freedom, but none advocates the radical notion that the First Amendment never protects classroom speech.

Petitioners place their firmest reliance upon the Fourth Circuit case of *Urofsky v. Gilmore*, 216 F.3d 401 (2000), *cert. denied*, 531 U.S. 1070 (2001). There, the *en banc* court upheld the constitutionality of a Virginia statute restricting public employees from accessing sexually explicit materials on computers owned or leased by the state. The statute included a protocol by which an employee could seek a variance, by applying to the state officials, demonstrating that the sexually explicit materials were relevant to a *bona fide* research project or undertaking, and securing prior approval. *Id.* at 405. Neither Urofsky nor his colleagues sought any such variances; instead, the professors challenged the law on its face. *Id.* at 405-06.

Upholding the statute's constitutionality, the court recognized the undisputable fact that a state "undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole." *Id.* at 406. To illustrate this point, the court borrowed this Court's analogy from *Connick*, noting that a state can surely prohibit an assistant district attorney from publicly undermining her supervisor's authority. *Id.* at 407-08. Even speech that might merit the state's vigilant protection on a public street need not be tolerated in a government office. By the same token, if a state does not wish to fund or enable internet access to sexually explicit materials – at least without a prior finding that the materials have legitimate academic value – this too is a content choice within its discretion.

Urofsky is not inconsistent with the instant case, most obviously because no speech was ever suppressed under the Virginia statute. The Fourth Circuit expressly recognized that a constitutional question might arise if any of the professors were denied access to materials that they felt were important to their academic work. 216 F.3d at 415, n.17.[3] The issue of the constitutional implications of suppressing academic speech – the very issue presented by JCC's retaliation against Kenneth Hardy – was simply not before the Fourth Circuit in *Urofsky*.

Prior Fourth Circuit cases confirm the *Urofsky* court's recognition that classroom speech may have constitutional implications. In cases where educators have suffered retaliation for their speech, the Fourth Circuit has applied the same scrutiny exacted by the Sixth Circuit on Ken Hardy's classroom discussion. In *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152 (4th Cir. 1992), the plaintiff, a South Carolina teacher, was terminated after circulating a letter to

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3. There appears to be a division among the circuits as to whether speech by educators receives greater protection than speech by other public employees. *Urofsky* traces the development of the doctrine of "academic freedom," from its roots in German universities, to its incorporation in the standards of the American Association of University Professors. 216 F.3d at 409-15. Ultimately, the Fourth Circuit concludes that because "academic freedom" is an educational construct, and not a legal one, teachers are on the same First Amendment footing as other public employees. *But see Blum v. Schlegel*, 18 F.3d 1005, 1011 (2d Cir. 1994) (holding that law professor's speech merited added protections based on the context – a law school class – which the court believed should be a forum for debate). Petitioners extend the Fourth Circuit's holding beyond a rejection of educators' *additional* First Amendment rights to mean a rejection of *any* First Amendment rights. This exceeds the Fourth Circuit's holding, and defies logic.

his colleagues, asking that they protest the school board's budget policies by taking part in an orchestrated "sick-out," in which all faculty would claim to be ill during exam week. *Id.* at 154.

The Fourth Circuit examined the content of Stroman's missive and found that, although it consisted primarily of his personal grievances, it also expressed concerns about budget management and other potentially meaningful fiscal issues confronting the school district. *Id.* at 158. The court held that because Stroman's "speech arguably relates to a matter of public concern" it was proper to weigh that interest against the school board's countervailing interest in the effective operation of its schools. *Id.* The court ultimately found that the school board's interests – having professors around to proctor exams, and being free from disloyal or subversive employees – were superior to Stroman's interests in airing his dirty fiscal laundry.[4] 981 F.2d at 159. Although its conclusion vindicated the school district, the Fourth Circuit's probing factual inquiry, guided by this Court's holdings in *Pickering* and *Connick*, belies Petitioners' argument that teachers abandon their First Amendment rights when they enter their workplace. *See also Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183 (4th Cir. 1994) (affirming judgment for teacher fired after she complained about excessive spending of taxpayer money for lavish conferences/ vacations).

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4. The Fourth Circuit also considered the fact that Stroman's epistle called for his colleagues to make false claims of illness – a patently dishonest practice. Here, of course, there is no allegation that Ken Hardy did anything improper, let alone suborn acts of disloyalty.

Petitioners are also in error when they claim that the Fifth Circuit denies constitutional protection to classroom speech. Their reliance on *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990), is particularly misplaced, since that case turned on a specific finding that no controversial speech was suppressed. Kirkland was a high school teacher who disregarded the approved supplemental reading list for his world history class, instead compiling a list of his own chosen readings. *Id.* at 796. None of the readings he chose was controversial; indeed, most were approved for other disciplines, and all were available in the school's library. *Id.* In unilaterally amending the reading list, Kirkland also ignored an accepted procedure that would have involved public meetings with teachers and parents to discuss the propriety of the additions. *Id.* at 800. Only after he was penalized for deviating from the approved list did he allege First Amendment violations, among other causes of action. *Id.* at 800.

The Fifth Circuit found that Kirkland's selection of the added books was not an issue of public concern, and that his case was merely one of an insubordinate employee attempting to transform a private employment dispute into a censorship claim. 890 F.2d at 800. The court emphasized that Kirkland did not allege that the school had ever censored any expression; instead it had made the eminently logical decision that *The Great Gatsby* and other canonical literary works had more merit in its English department than in Kirkland's history class. *See id* at 796 n.3. The Fifth Circuit clarified the fact-specific nature of its holding:

> Our decision should not be misconstrued as suggesting that a teacher's creativity is

> incompatible with the first amendment, nor is it intended to suggest that public school teachers foster free debate in their classrooms only at their own risk or that their classrooms must be "cast with a pall of orthodoxy." We hold only that public school teachers are not free, under the first amendment, to arrogate control of curricula.

Id. at 801-02; quoting in part *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The court did not dismiss the possible constitutional implications of censorship, holding only that "Kirkland's conduct in disregarding Northside's administrative process does not constitute protected speech." *Id.* at 802.

Other Fifth Circuit precedent makes clear that classroom speech is not categorically denied First Amendment protection. In *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986), the Fifth Circuit conducted the same *Connick*-based inquiry employed by the Sixth Circuit here. Martin, an economics professor, routinely degraded his students' attitudes toward the class, and toward economics as a discipline, often colorfully analogizing those attitudes to the solid waste of certain male bovines. *Id.* at 584. The Fifth Circuit did not focus exclusively on the venue of the speech – the factor Petitioner would hold to be dispositive. Instead, the court evaluated Martin's speech based on the complete record, finding his vulgar language unprotected by the First Amendment "because, taken in context, it constituted a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification." *Id.* at 586.

If Martin's speech had been outside the ambit of the First Amendment simply because it took place in his classroom, then the Fifth Circuit's examination of its academic relevance would have been superfluous. The fact that the court subjected the speech to a critical analysis shows that its distinction between "employee speech" and "citizen speech" requires something far more nuanced than the simple scope-of-employment test Petitioners now advocate. *See also Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 366 (5th Cir. 2000) (discussing the "citizen-employee" distinction recognized by *Connick*, and holding that speech may raise issue of public concern even where employee is motivated partly by personal interest); *Tompkins v. Vickers*, 26 F.3d 603, 607 (5th Cir. 1994) (dismissing as unpersuasive school administrator's claim that, because complaining teacher stood to benefit from continued funding of art program, his criticism of its closure was not public speech); *Kingsville Independent School Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (unambiguously holding that "classroom discussion is protected activity").

The Third Circuit – the final circuit court that Petitioners place on their side of the purported divide – also recognizes that professors have First Amendment rights, even where their speech relates to their employment. *Johnson v. Lincoln University*, 776 F.2d 443 (3d Cir. 1985); *see also Trotman v. Board of Trustees of Lincoln University*, 635 F.2d 216 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981). Dr. William Johnson was the Chairman of Lincoln University's Chemistry department and was, like Ken Hardy, a distinguished member of his college's faculty. *Johnson*, 776 F.2d at 447. A series of bitter internal disputes led to Johnson's firing, and he alleged that the termination was retaliation for his protected speech.

Applying the then-recent *Connick* standard, the Third Circuit vacated the district court's grant of summary judgment in favor of the university. Faulting the lower court for its casual dismissal of Johnson's allegations of grade inflation and other academic irregularities as merely an "outgrowth of his personal dispute," the court cautioned:

> If, in fact, the employee's speech is largely composed of matters of only personal concern, that becomes relevant when the balancing is done, not in the determination whether the speech touches on a matter of public concern. The court, then, cannot make a superficial characterization of the speech or activity taken as a whole; to do so would undermine the entire purpose of the *Pickering* test. Instead, it must conduct a particularized examination of each activity for which the protection of the First Amendment is claimed.

Id. at 451. The Third Circuit ultimately concluded that Johnson's complaints implicated matters of public concern, notwithstanding the fact that they were also the product of a decidedly disgruntled employee.

Contrary to Petitioners' assertions, there is no division among the circuits on the threshold question of whether classroom speech merits First Amendment protection. Extensive precedent from the Third, Fourth, and Fifth Circuits reflects the same careful consideration of context engaged in by the Sixth Circuit in this case, and in *Dambrot*. The "content, form, and context" inquiry mandated by *Connick* requires courts to answer the substantive threshold question of whether employee speech raises viable issues of public concern. *See also Swank v. Smart*, 898 F.2d 1247, 1251

(7th Cir. 1990), *cert. denied*, 498 U.S. 853 (1990) (wherein Judge Posner dismisses public employee social banter as "too remote from . . . familiar emporia of the marketplace of ideas to activate the guarantees of the First Amendment"). The linguistic and sociological impact of language, the subject of Ken Hardy's classroom discussion, is a core issue of public concern, and cannot be dismissed by any reasonable person as mere "chit-chat." *See id.*

II. THIS COURT'S PRIOR DECISIONS IN PICKERING AND CONNICK MAKE THIS CASE A POOR CANDIDATE FOR PLENARY REVIEW

Petitioners argue that a grant of certiorari will allow the Court to establish a uniform standard for judicial review of cases involving speech by public employees. While the constitutional magnitude of this issue is undeniably great, Petitioners fail to understand that this Court has confronted the issue many times before, and has made the considered decision not to establish a bright-line test, instead preferring a case-specific and fact-specific approach. This Court's opinion in *Pickering*, by requiring courts to balance the substantive interests of the individual against those of the state institution, acknowledged that uniformity was impracticable in an area where so many different factual scenarios can arise.

The *Connick* decision, demanding judicial inquiry into the content, form, and context of public employee speech, again unambiguously declined to reduce this vital constitutional question to a facile formula.[5] The fact-specific

5. While *Connick* also clarified the importance of an employee's personal stake in the subject speech, this factor does not enter the calculus here because, as noted above, Ken Hardy advanced no extracurricular agenda by conducting his classroom discussion.

nature of the judicial inquiry mandated by these cases limits the precedential value of any case decided in this area.

This Court's resolution of the current dispute would not, as Petitioners suggest, provide uniformity in the nation's First Amendment public speech jurisprudence; this Court has already concluded that uniformity in this area is pragmatically unattainable. Instead, this Court would only answer the question of whether a college may lawfully terminate a professor for conducting an academic examination of the word "nigger" where the classroom discussion: violated no established school policy; had no adverse effect on the school's academic mission; did not stray beyond the bounds of academic propriety; and, caused the college to retaliate only as a gesture of appeasement to a community activist who threatened to cause public outcry if the professor were not let go. Posited in such a factually ponderous manner, this question admittedly remains an immensely interesting one, but it does not merit this Court's attention, as it is highly unlikely to arise again.

CONCLUSION

For the reasons discussed above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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